IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17667 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEVARSONS PRIVATE LTD - Petitioner(s)

Versus

U.P.SINGH - Respondent(s)

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Appearance :
MR SN DIVATIA for Petitioner(s) : 1,
MR TANVISH U BHATT for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 18/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.Heard Mr.S.N.Divetia and Mr.T.U.Bhatt, the learned counsel appearing for the petitioner and the respondent

respectively. Rule. Mr.Bhatt waives service of rule. The petition is taken up for final hearing and disposal today, with consent of the learned counsel as the disputes lies in a very narrow compass.

2. The petitioner is a Private Limited Company. For assessment year 1989-90, the petitioner made a claim that export cash assistance amounting to Rs.7,68,651/- was exempt being a capital receipt. This claim was made in the return of income filed on 29th December 1989. It appears that, during the course of assessment proceedings under section 143(3) of the Income Tax Act, 1961 (the Act), the petitioner addressed a letter dated 22nd January 1991 addressed to the assessing officer informing that, by Finance Act, 1990, export cash assistance had become taxable because of amendment with retrospective effect from 1st April 1967. Accordingly, the assessing officer brought the said amount to tax. He also levied interest under section 234B of the Act to the tune of Rs.3,48,122/-.

3. The petitioner moved an application before Central Board of Direct Taxes, in the first instance, requesting for waiver / reduction of the interest

levied under Section 234B of the Act. The said application came to be rejected by communication dated January 21/28, 1993. The petitioner thereupon approached this Court by way of Special Civil Application No.9783 of 1994.

4. This Court, after extensively setting out the ratio of the Apex Court decision in the case of C.I.T. v. Hindustan Electro Graphites Ltd., [2000] 243 ITR 48, stated as under :

> “Although the above observations were in the context of levy of additional tax under section 143(1A), the same reasoning would apply in the matter of waiver of interest under section 234B of the Act. On the date when the assessee was required to pay advance tax and even on the date of filing of the return, the assessee could not have been expected to pay tax on the export cash assistance received by him in the year ended March 31, 1989, nor to show the same as income in the return filed on December 29, 1989. It was after the expiry of the assessment year that there was a statutory amendment with retrospective effect making the export cash assistance taxable with effect from April 1, 1967. Under the circumstances, the notification dated May 23, 1996 (see [1997] 225 ITR (St.)

101), particularly para (d) thereof, issued under section 119(2)(a) would be applicable. The relevant portion of the notification reads as under :

> "In exercise of the powers conferred under clause (a) of sub-section (2) of section 119, the Central Board of Direct Taxes, hereby direct that the Chief Commissioner of Income-tax and Director-General of Income-tax may reduce or waive interest charged under section 234A or section 234B or section 234C of the Act in the classes of cases or classes of income specified in paragraph 2 of this order for the period and to the extent the Chief Commissioner of Income-tax / Director-General of Income-tax deem fit. However, no reduction or waiver of such interest shall be ordered unless the assessee has filed the return of income for the relevant assessment year and paid the entire tax due on the income as assessed except the amount of interest for which reduction or waiver has been requested for. The Chief Commissioner of Income-tax / Director-General of Income-tax may

also impose any other conditions deemed fit for the said reduction or waiver of interest. ...

(d)Where any income which was not chargeable to income-tax on the basis of any order passed in the case of an assessee by the High Court within whose jurisdiction he is assessable to income-tax, and as a result, he did not pay income-tax in relation to such income in any previous year and subsequently, in consequence of any retrospective amendment of law or, as the case may be, the decision of the Supreme Court in his own case, which event has taken place after the end of any such previous year, in any assessment or reassessment proceedings the advance tax paid by the assessee during the financial year immediately preceding the relevant assessment year is found to be less than the amount of advance tax payable on his current income, the assessee is chargeable to interest under section 234B or section 234C and the Chief Commissioner of Income-tax / Director-General is

satisfied that this is a fit case for reduction or waiver of such interest.”

We, are, therefore, clearly of the view that the present case would squarely fall under clause (d) of the aforesaid notification. Since the petitioner's tax liability arose subsequently after filing of the return and after the expiry of the assessment year on account of retrospective amendment of law, consequential levy of interest under section 234B was clearly required to be dealt with as a fit case for reduction or waiver of interest.”

5. The matter having been restored to the file of Chief Commissioner of Income Tax, Ahmedabad – 1, an order came to be made by the respondent on 4th March 2005. He has reduced the interest by a sum of Rs.2,48,122/- while retaining interest to the extent of Rs.1,00,000/- by observing as under :

“The clause (d) is broadly applicable in the case of the assessee as the amendment for treating export incentive as taxable was made by Finance Act, 1990 subsequent to the end of the Financial Year 1988-89. However, the said clause (d) of CBDT's order u/s 119(2)(a) requires that such amendment in law treating any

income chargeable to tax should have been made contrary to the decision of Hon'ble High Court within whose jurisdiction the assessee falls. However, the requirement of the decision of Hon'ble High Court in assessee's own case was waived by the CBDT vide circular dated 31/1/1997. The condition that there existed an order of Jurisdictional High Court treating such receipt as non taxable is not apparently fulfilled in this case. However, it is true that the assessee was agitating for earlier assessment years before the Tribunal and Tribunal had held that such export incentive receipts were a capital receipt and therefore, not includible in taxable income. Before the end of the financial year, i.e. 31/3/1989, Ahmedabad Tribunal in assessee's own case had given a decision for A.Y. 1983-84 on 1/3/89 i.e. export cash assistance is not taxable. Therefore, it is very clear that while paying advance tax and filing its return for the A.Y. 1989-90, the assessee was under bonafide belief that export cash assistance was not includible in the assessee's income. Further, immediately after the amendment, the assessee itself requested to include the export cash assistance in the income for the year and paid taxes thereon. Under these circumstances, I am of the view that under the clause (d) of the order of CBDT u/s 119(2)(a) as discussed above, interest charged u/s 234B should be waived partly. Accordingly, interest charged u/s 234B is

restricted to Rs.1,00,000- and the rest of the interest charged u/s 234B on account of export cash assistance is hereby waived."

6.It is apparent from the facts of the case that the respondent has failed to give any reason for retaining the interest to the extent of Rs.1 lakh, while holding that, in the circumstances, interest charged under section 234B of the Act should be waived partly under clause (d) of the Circular No.F.No.400/234/95-IT(B) dated 23/5/1996 reported in (1997) 225 ITR (Statute) 101. The reason about non-availability of a judgement of jurisdictional high court cannot be termed to be a valid reason in the facts of the case, considering that the amendment, though by Finance Act, 1990,was made retrospectively applicable from 1-4-1967.

7.In the case of Bhanuben Panchal and Chandrikaben Panchal v. Chief Commissioner of Income Tax, [2004] 269 ITR 27, this Court has categorically stated that, "It is thus clear that clauses (a) to (d) all state the circumstances beyond the control of the assessee and they may be considered as the species or illustrations of unavoidable circumstances or circumstances beyond the control of the assessee which is the genus

contained in clause (e) providing that where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by the assessee or his legal heirs without detection by the Assessing Officer, waiver of interest can be considered.”

8. As noted hereinbefore, in assessee's own case in the earlier round of litigation, it has been held by this Court that the present case would squarely fall under clause (d) of the aforesaid notification. Once this finding has been recorded by this Court, it was not open to the respondent to state that clause (d) is broadly applicable in the case of the assessee. The respondent could not have read the clause of the circular as a provision of the statute so as to come to the conclusion that the condition regarding existence of order of jurisdictional High Court was not apparently fulfilled. The respondent has recorded a finding that the assessee was under a bonafide belief that export cash assistance was not includible in the assessee's income. Further, it has been held that immediately after amendment, the assessee itself requested to include the said item in the taxable

income of the year under consideration and paid taxes thereon.

9. In the aforesaid fact situation, the exercise of discretion by the respondent is not in consonance with the decision of this Court in the case of Bhanuben Panchal (supra) and assessee's own case. In fact, as noticed, no reason has been assigned by the respondent for retaining the interest at Rs.1,00,000/-. In the circumstances, the impugned order dated 4th March 2005 cannot be permitted to stand and is quashed and set aside. The respondent is directed to waive the remainder interest by passing a fresh order.

10. The petition is allowed accordingly. Rule is made absolute. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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